IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

## No. 282

SWIFT & COMPANY, *Appellant*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from the United States District Court for the Northern District of Illinois.

## APPELLANT'S REPLY BRIEF.

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,

WM. N. STRACK,
ARTHUR C. O'MEARA,
JOHN P. STALEY,
ROSS DEAN RYNDER,
4115 South Packers Avenue,
Chicago 9, Illinois,
*Counsel for the Appellant.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX.

## AUTHORITIES

CASES:

*Judicial Decisions:*



*Interstate Commerce Commission Reports:*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

---

No. 282

SWIFT & COMPANY, *Appellant*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

---

**On Appeal from the United States District Court for the Northern District of Illinois.**

---

## APPELLANT'S REPLY BRIEF.

---

The several appellees have filed five briefs, aggregating 304 pages of statement, argument, and mixed statement-cum-argument. In order to avoid burdening the Court with any repetition of what we have already said in our main brief, and in order to compress this reply brief within reasonable compass, we are restricting it to new matter presented by the appellees, concentrating attention on the issues which are essential, and pointing out those misstatements which seem most imperatively to require correction.

In general, we follow herein the outline and the roman numeral headings of our main brief, although the captions of those headings vary in phraseology from those previously employed.

## I. THE SWITCHING CHARGE IS A PENALTY AND HENCE UNREASONABLE AND ILLEGAL.

### A. The switching charge is in fact assessed only against livestock delivered to sidetracks on the Chicago Junction.

We pointed out in our Statement (Swift Br. 11, 15-17), that the switching charge of $39.24 per car now in issue applied only to livestock consigned to sidetracks such as Swift's located on the tracks of the Chicago Junction; that it was inapplicable to any other commodity delivered to the same sidetracks; and that it was likewise inapplicable to livestock delivered to the Union Stock Yards or to Swift's Omaha Packing Co. pens on the rails of the Burlington.

These basic and fully documented facts are not questioned by any of the intervening appellees.

The Government, however, challenges our statement, saying (Br. 54):

> But, as pointed out in the Commission report here (R. 80), the switching charge is one applying on "all carload freight." It is because the tariff provision is thus unqualified that it includes livestock, but, for the same reason, it includes and applies to any dead freight as to which joint rates have not been established, or specific charge published. Certainly, as so applying on both dead freight and livestock, it cannot be logically assumed that the switching charge is, or ever was, one made purposely high to force deliveries of livestock at the public yards instead of at the plants of the packers.

The quoted contention completely misapprehends the record in the case. The fact of the matter is that, while the switching charge *per se* is general, it is actually applied only as set forth in our original brief, so that it is payable only in respect of livestock consigned to sidetracks on the Chicago Junction. This is apparent from the undisputed testimony on the tariff and rate situation:

The line-haul carriers publish rates to Chicago in their tariffs and refer therein to a tariff of Agent R. G. Raasch

which provides for the application of such line-haul rates within the Chicago Switching District. Reference to the Raasch tariff shows that, with respect to dead freight, the flat Chicago rate includes a delivery on the sidetracks of the Junction (as well as of other lines in the switching district). The Junction is a party to the Raasch tariff under rules of tariff publication prescribed by the Commission, and its local switching tariff has no application to the delivery of such line-haul traffic. All interstate carload freight, other than livestock, destined to or forwarded from the meat packing industries in the stockyards area is so treated by tariff publications, and it is accordingly delivered, or accepted and transported, at the flat line-haul rates from or to the various destinations. (R. 285-289.) And see the list of commodities which are given delivery at all industrial locations in the Chicago Switching District at the line-haul rate, Ex. 10, at R. 1057-1060. See also R. 297-299, explaining the exhibit.

The method whereby the Junction is compensated for its delivery service was clearly explained by the publisher of the terminal tariff, Agent R. G. Raasch (R. 843-846): The Junction receives from the line-haul carrier—not from the consignee or shipper—a division of the line-haul rate to Chicago. The Junction's share of that rate, at the time of the hearing, was a minimum division of $18.90 per car, which is to be compared with the switching charge, at that time, of $28.80 per car (R. 78, 87, 846).[1] But the consignee is required to pay only the line-haul rate in respect of all deliveries other than livestock consigned to sidetracks on the Chicago Junction (R. 285-289). The defendants before the Commission—the intervening appellees here—failed to show, in all of the present voluminous record, a single instance of the assessment of the Chicago Junction's switch-

[1] If the increase in the division has kept pace with the increase in the switching rate—and this is assumption only, as the point has not been verified—then the present comparison would be, switching charge, $39.24; division, $25.74.

ing charge on "all carload freight" on any interstate shipment other than livestock to or from a Junction sidetrack. The Government's conclusion (Br. 54), quoted above, p. 2, is therefore simply not so.[2]

**B. The Commission's refusal to establish joint rates amounted, in the circumstances of this case, to approving an existing discrimination.**

The preceding section will have served to explain why it was that Swift, in its amended complaint before the Commission (R. 56), prayed for the establishment of joint through rates between the line-haul carriers and the Chicago Junction in respect of livestock delivered to its sidetrack. It did so because, although switching rates are generally absorbed by the line-haul carriers throughout the country, in Chicago the practice has been to compensate the terminal carrier by a division of the through rate (R. 293-295, 843-845).

It is true that, as the Chicago Live Stock Exchange says (Br. 21-22)——

> The Commission has no power by order directed against a line-haul carrier alone to require such line-haul carrier to extend the rate published by it to Chicago (as a point on its own line) to a delivery not on its line—that being the effect of an order requiring the absorption of a switching charge—in the absence of a finding of unjust discrimination and undue prejudice, that is, in the absence of proven violations of section 2 or 3(1) of the Act.

But this rule has no application to the prayer of Swift's amended complaint. If the Chicago & North Western, for example, chose to confine the application of its Chicago rate to sidetracks on its own line in Chicago, it could not be re-

[2] The journey through the mechanics of the tariffs just undertaken also demonstrates the complete factual incorrectness of the Government's further statement (Br. 31) that "The line-haul rates do not include compensation for such switching".

quired to effect a delivery, at that rate, on a New York Central sidetrack. That much follows from the rule invoked by the Chicago Live Stock Exchange. But when the Chicago & North Western extends the application of its Chicago rate by a joint-rate arrangement (as in connection with dead freight), or by a trackage arrangement (as with livestock to the stockyard sidetracks), so as to effect a delivery at its Chicago rate on the line of the New York Central (the lessee of the Junction), then, we submit, it is required to give equal and like treatment to both consignees A and B on the New York Central tracks; and it may not decide that it will serve consignee A at the flat Chicago rate and consignee B at the Chicago rate plus $39.24 for a like service.

The Commission's finding (R. 81) "that establishment of joint rates for the transportation of this traffic is not necessary or desirable in the public interest", and the contentions of several appellees (C. L. S. Ex. Br. 12, 22-27; R. R. Br. 87-88) that this finding involves a determination under Section 15(3) of the Act that the granting of Swift's prayer would not be in the public interest, must be viewed against the tariff background just set out.

Where the establishment of joint rates is sought as an inducement for additional traffic, as, for example, joint rates on grain from Fargo, North Dakota, to Louisville, Kentucky, over the tracks of several connecting carriers, then the judgment of the Commission that the public interest does not require such rates is ordinarily conclusive.

If, similarly, the Commission in this case had removed the discrimination complained of by some method other than the establishment of joint rates, obviously its judgment would be unassailable. But where, as here, the Commission refuses to establish joint rates for one commodity delivered to sidetracks when similar joint rates are available for the same commodity delivered a few blocks away, and are also available for the delivery of every other commodity, then its finding amounts to a determination that

the public interest is served by continuing the resulta discrimination.

We recognize, of course, that the expression "public i terest" is an elusive variable of uncertain, flexible, a elastic content. But whatever the term may mean, it mu reflect at the very least a meaning consistent with rath than opposed to the substantive anti-discrimination pr visions of the Interstate Commerce Act. Consequentl when, as here, violations of that Act have been establishe the Commission can not be heard to say that to redre those violations "is not necessary or desirable in the pu lic interest" (R. 81). The removal of "the evil of di crimination", the principal target of the Interstate Co merce Act over the years, is of the essence of any fai minded concept of "the public interest."

**C. The switching charge is a penalty because it is directe against a single commodity.**

Apart from all the other considerations already ca vassed at length, the high additional switching charge he in question, assessed only against livestock delivered t sidetracks, is a penalty because it is directed at a sing commodity—and the Commission and this Court so held i the Cleveland Stock Yards case.

The Commission in that case said (*Swift & Co.* v. *Balt more & O. R. Co.*, 266 I. C. C. 55, 66):

> In fact, regardless of the amount of compensatio specified by the Stock Yards for the use of its track fo the carriage of livestock, the very singling out of live stock for the requirement of special compensation fro the railroad shows that the provision is properl classed as a penalty provision, that is, one designe to secure yardage charges on livestock billed and mov ing to complainant's siding, either from complainant or from the railroad engaged in hauling the traffic.

And this Court said, sustaining the Commission's report (*United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, 174, 175):

> After notice and hearing the Commission concluded that the railroad's refusal to carry livestock to Swift violated several provisions of the Interstate Commerce Act. It was found to violate § 3 (1) because of the discrimination against a single commodity, livestock * * *
>
> The Commission's findings of fact are not challenged. There can be no doubt that those facts found would constitute a violation of the sections referred to if Spur No. 245 were wholly owned by the railroad.

And the Court went on to hold that the railroad's non-ownership of the track in question did not vary the parties' rights under the Interstate Commerce Act.

As we point out below, pp. 12-13, these aspects of the Cleveland case have up to now escaped the notice of all appellees hereto.[3]

## II. THE SWITCHING CHARGE VIOLATES NUMEROUS PROVISIONS OF THE INTERSTATE COMMERCE ACT.

### A. Swift amply met the burden of proof of showing that the rates assessed for delivery of livestock to its sidetrack were unreasonable, unjustly discriminatory, and unduly prejudicial.

It is asserted in numerous of the appellees' briefs (Govt. Br. 40-41; R. R. Br. 90-92; C. L. S. Ex. Br. 28; N. L. S. P. Assn. Br. 30-31) that Swift failed to bear the burden of showing that the rates for delivery of livestock to its sidetrack (line-haul rates plus $39.24 per car) were unreasonable, unjustly discriminatory, and unduly prejudicial.

These assertions disregard undisputed facts of record.

Swift showed that the carriers charged $39.24 more to deliver a carload of livestock than to deliver a carload of

[3] The railroads say (R. R. Br. 93) that, "In characterizing the rate as a penalty, Swift is simply resorting to epithet." We wonder whether, if they had been aware of the Commission's characterization just quoted above, they would similarly have criticized the Commission's analysis.

dead freight, at the same time, and with the same engine movement, to the Swift sidetrack, thereby establishing a discrimination against livestock and a violation of Section 3(1). Swift further showed that of two cars of livestock starting at the same point of origin, moving over the same line-haul rails, in the same train, to the break-up yards in Chicago, switched over the same tracks in Chicago to the Junction connection, and then placed on Junction tracks within a few city blocks of each other, one would be delivered at the flat line-haul rate, while the other would be charged $39.24 additional. Without more, this established a violation of Section 2.

The foregoing would leave open but one question, the compensatory character of the line-haul rates on livestock which had been prescribed by the Commission in *Livestock —Western District Rates*, 176 I. C. C. 1, and which are still in effect (subject to subsequent general increases). On that question we relied on the Commission's statements that those rates were adequate to cover the line-haul carriage plus terminal service plus unloading at the stockyards. *Omaha Live Stock Exc.* v. *Chicago & N. W. Ry. Co.*, 178 I. C. C. 1, 14; *Chicago Live Stock Exc.* v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 546. By that showing, coupled with the fact that a delivery to the Swift sidetrack would relieve the carriers of the cost of unloading, Swift had established without more that the line-haul rate plus $39.24 per car to its sidetrack was unreasonable and unlawful,[4] quite apart from the unreasonable-because-a-penalty phase discussed at Swift Br. 56-62.

Swift has therefore amply sustained its burden of proof. Indeed, we venture to assert that far less proof of discrimination was held sufficient to set aside the order considered

---

[4] If a cost study would justify higher rates *both* for the stockyard delivery and the Swift sidetrack delivery, doubtless the Commission should approve it. But in that case the stockyards and commission merchants would probably not be in the case as interveners on the side of the railroads.

in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. *Cf. Alabama Great S. R. Co.* v. *United States*, 340 U. S. 216, 227.

It is no answer for the several appellees now to urge that the Commission's use of the words "substantially dissimilar" (R. 78) to dispose of the foregoing indisputable discriminations has the effect of legalizing them beyond the possibility of further review (Govt. Br. 48-49; R. R. Br. 26, 91, 92-93, 102, 105; C. L. S. Ex. Br. 18, 36; N. L. S. P. Assn. Br. 19-22, 29-30, 33). "To rest upon a formula," wrote Mr. Justice Holmes,[5] "is a slumber that, prolonged, means death." To rest every case of alleged discrimination on the Commission's finding of "substantially dissimilar" is to close one's eyes to actualities, and is a practice which, if prolonged, will mean the end of any effective effort to wipe out discriminations in interstate commerce. The record in this case, and the reliance placed by the appellees on "substantially dissimilar", proves that the assertion last made is not in any sense far-fetched.

**B. The switching charge violates Section 1(9) of the Act because it is applied only to deliveries of livestock over appellant's switch and not to such deliveries over the Union Stock Yards' switch.**

(1) The gravamen of Swift's complaint under Section 1(9) is that, when livestock is delivered over the Switch leading to Swift's sidetrack, such delivery costs $39.24 per car more than the line-haul rate, while when livestock is delivered over the switch leading to the unloading chutes of the Union Stock Yards, a few city blocks distant, the delivery is effected at the flat line-haul rate. Obviously, this condition violates the command of the statute that the switch connection shall be operated "without discrimination in favor of or against any such shipper." We are therefore at a loss to understand the assertion of the Chi-

[5] "Ideals and Doubts", in *Collected Legal Papers*, 303, 306.

cago Live Stock Exchange (Br. 40) that "The instant pr ceeding involves no question of discriminatory service. For, even on the most conceptualistically nice distinctio between "service" and "rates", it is plain that to switc a car over one sidetrack for $39.24 more than to switch a identical car to another sidetrack nearby involves a di crimination in service.

(2) The Government's argument under this provisio although not based on the rates vs. service distinctio seems to rest on the verbal fascination inherent in the wo "terminal". The Government says (Br. 27): "The Unio Stock Yards * * * has been held by this Court to be terminal, and terminal delivery cannot be equated wit private sidetrack delivery." And again (Br. 48): "Thi Court has said that a carrier cannot exact an extra charg for the use of a terminal [citing *Covington Stock Yard Co.* v. *Keith*, 139 U. S. 128, 135-136]. It hardly follows tha a carrier may not exact an extra charge from one wh chooses not to use the terminal and who desires and re ceives private sidetrack delivery."

It is really amazing that the Government should b unaware that a private sidetrack is equally a terminal, a this Court, sustaining the Commission, long since held. Se *Associated Jobbers of Los Angeles* v. *Atchison, T. & S. F Ry. Co.*, 18 I. C. C. 310, sustained in *Los Angeles Switchin Case*, 234 U. S. 294. This Court said, speaking through Hughes, J. (as he then was), 234 U. S. at 307:

> The Commission found that these spur tracks were portions of the terminal facilities of the carriers with whose lines they connected, being distinguished from mere plant facilities * * *. Each of the spurs here considered, said the Commission, is, in a real sense, a railroad terminal at which the carrier receives and delivers freight.

The Commission in that case had found—and we sum marize to shorten the discussion—that delivery of carload traffic upon private sidetracks had largely supplanted de-

livery through carriers' freight houses or team tracks; that each of these sidetracks had, in effect, become a railroad terminal at which the carrier receives and delivers freight; that there were then (in 1910) literally hundreds of thousands of such tracks in this country, and that it would be difficult to conceive any system for conducting the vast volume of our heavy traffic without the spur track; that it would be manifestly unfair to treat the industrial spur as a plant facility for shippers' convenience; and that it had become a necessity to both the carrier and shipper under modern conditions of business and transportation.

To the extent, therefore, that there is magic in the word "terminal", it sheds its aura not only over the unloading chutes of the Union Stock Yards, but, equally, upon every private switchtrack and over the railroads' team tracks (Ex. 17, R. 1101-1102) as well. The Government's contention to the contrary is plainly unsound.

Moreover, if the last sentence in Section 15(5) of the Act—"Nothing in this paragraph shall be construed to affect * * * the duty of performing service as to shipments other than those to or from public stockyards"—means anything at all, it means, at the very least, that carriers may not treat a sidetrack consignee as *caput lupinum*, outlawed from the normal protections against discrimination.[6]

---

[6] The Government is of course clearly in error in saying (Br. 47) that "By Section 15(5) of the Interstate Commerce Act, Congress has stipulated for stockyards delivery at the line-haul rate * * *." That provision required carriers to absorb the expenses of *unloading* at public stockyards, see *Omaha Packing Co.* v. *Atchison, T. & S. F. Ry. Co.*, 66 I. C. C. 44; *Cudahy Packing Co.* v. *Atchison, T. & S. F. Ry. Co.*, 234 I. C. C. 569; *cf. Adams* v. *Mills*, 286 U. S. 397, *passim*, but it has nothing whatsoever to do with the line-haul rate. Indeed, the Commission for many years sanctioned a terminal charge in addition to the line-haul rate for all deliveries of livestock made to the Union Stock Yards. *Livestock—Western District Rates*, 176 I. C. C. 1, 122-124; *Chicago Live Stock Exc.* v. *Atchison, T. & S. F. Ry. Co.*, 197 I. C. C. 463.

**C. Analysis is of the appellees' arguments further demonstrates the controlling nature of the Cleveland Stock Yards case.**

In response to our argument (Swift Br. 83, 86-89) that the Cleveland Stock Yards case, *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, is controlling, and condemns the high additional switching charge here in question, which is assessed only against livestock delivered to sidetracks, each of the five briefs filed by appellees attempts to distinguish the cited case (Govt. Br. 28, 44-47; R. R. Br. 107-109; N. S. Y. Br. 41; C. L. S. Ex. Br. 15, 35, 40-45; N. L. S. P. Assn. Br. 27-29). Yet not a single one of the five briefs sees fit to mention one of the critical portions of that decision, *viz.*, the statement in the opinion that the New York Central's refusal to carry livestock was a violation of Section 3(1) of the Act. See 333 U. S. at 174, 175, quoted *supra*, p. 7.

That portion of the Cleveland case of course disposes of the contention of the Chicago Live Stock Exchange (Br. 34-35), that, on the footing that "'Livestock is not competitive with dead freight'", a practice directed solely against livestock is not violative of Section 3(1). Moreover, the Chicago Live Stock Exchange (Br. 35) ignores the portion of the Commission's report in the Cleveland case quoted above, p. 6, 266 I. C. C. at 66, which held that the singling out of livestock as the subject of special compensation branded the charge as a penalty provision. Similarly, that appellee's argument (C. L. S. Ex. Br. 15, 41) that the Cleveland case related only to rates and not to services misapprehends the issues there; the Cleveland Stock Yards wanted yardage fees, and were perfectly content to let livestock pass over Track 1619, so long as those fees were paid; and indeed the railroad in that case paid those fees for a number of years. See 266 I. C. C. at 61.

But the prevailing distinction attempted to be made of the Cleveland case by the appellees is that it somehow involved a restoration of a long-standing practice of de-

livery, that the gravamen of Swift's complaint there was the disturbance of customary method, and that the Commission and this Court restored the *status quo*. See Govt. Br. 46; R. R. Br. 107-109; C. L. S. Ex. Br. 45; N. L. S. P. Assn. Br. 27-29.

The short answer to this bizarre suggestion is that it finds support neither in the record of the Cleveland case (No 223, Oct. T. 1947) nor in the Commission's report, nor in this Court's opinion. And no such contention was put forth either in the several appellants' briefs in that case, or in the oral argument made by counsel for the prevailing side. The basic issues were, first, whether there was present discrimination, and, second, whether the non-ownership of the track segment excused the railroad's failure to comply with the provisions of the Interstate Commerce Act. The notion that the rationale of *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, reflects a rudimentary recognition of the beatitudes of Railway Statics is, however viewed, wholly fanciful.

## III. CONGESTION NO JUSTIFICATION FOR DISCRIMINATION.

### A. None of the cases cited by appellees support—or even suggest—the proposition that congestion or inadequacy of facilities or the possibility of disruption may justify an otherwise unlawful discrimination within the identical terminal area.

We argued (Swift Br. 90-91, 103-104, 134-135) that neither present nor future congestion, nor inadequacy of facilities, nor long-continued practice, could justify a course of conduct otherwise discriminatory. We pointed out that no judicial or administrative authorities, other than the rulings under review, supported the ground advanced by the Commission to justify the discrimination here complained of.

That vacuum of authority is certainly not filled by anything in the 300-odd pages of briefs filed by the appellees.

That mountainous mass of argumentative matter yields up, on the point now in question, only one tiny forensic mouse, *viz.*, a statement by the railroads (R. R. Br. 110) that—

> Congestion and other like factors affecting the character of the service and the measure of the rates necessary to compensate therefor have been considered in countless cases. *St. Louis Chamber of Commerce* v. *B. & O. R. R. Co.*, 57 I. C. C. 639 at 646; *Illinois Brick Co.* v. *Director General*, 73 I. C. C. 215 at 217; *Illinois Brick Co.* v. *Director General*, 102 I. C. C. 64 at 66; *Mississippi Valley Iron Co.* v. *C. & N. W. Ry. Co.*, 104 I. C. C. 243 at 245-246; *Carload Traffic in Chicago District*, 174 I. C. C. 111 at 116; *Sonken-Galamba Corp.* v. *Chicago & A. R. Co.*, 181 I. C. C. 229 at 247; *Switching Fruits and Vegetables at Baltimore, Md.*, 201 I. C. C. 689 at 695 and 697.

None of the cases cited supports the quoted proposition. Thus, in *St. Louis Chamber of Commerce* v. *Baltimore & O. R. Co.*, 57 I. C. C. 639, the Commission approved a rate on coal from nearby Illinois mines to St. Louis, Missouri, 20 cents per ton higher than the rate from the same mines to East St. Louis, Illinois. To reach the former point the coal had to be transported a greater distance than to East St. Louis, across a Mississippi River bridge, and be delivered on the line of another carrier in St. Louis, Missouri. There is no suggestion in the report that a higher rate might be charged from the Illinois mines to another delivery in East St. Louis, on the same terminal tracks. Yet that factor would be necessary for the decision to be in point here.

The other six cases all have the same infirmity with respect to the proposition now urged by the appellees. For example, *Mississippi Valley Iron Co.* v. *Chicago & N. W. Ry. Co.*, 104 I. C. C. 243, involved a difference in rates on iron ore from Ironwood, Michigan, to Carondelet, Missouri, compared with the rate to Granite City, Illinois. The latter point is in the East St. Louis, Illinois, switching district, the former in the St. Louis, Missouri, switching district. The haul to the former point was longer, involved crossing

the Mississippi River, and delivery in another industrial area. The Commission held there was no violation of Section 2 of the Interstate Commerce Act. Obviously this was true, because the two hauls were to two different industrial areas, separated by the greatest river in the United States. There is in the decision no suggestion that a higher rate could be charged to consignee A, in Granite City, Illinois, on a sidetrack of the Pennsylvania Railroad, than to consignee B, in the same city, and likewise on a nearby sidetrack of the Pennsylvania. Only such a holding, which the Commission has never made except in the present case, would render apposite the decisions now cited by the railroads.

In short, those authorities amount only to this, that congestion is a factor properly to be considered in determining the reasonableness of given rates to different points in different terminal districts. That is very different from relying on congestion to justify a difference in rates to points within a few city blocks of each other in the same terminal district.

Similarly, the Government's first point (Br. 29) is that "In determining the issues raised in the proceedings, it was essential that the Commission consider the lay-out of yards and tracks of the Junction; the Junction's present operations in handling dead freight; the method by which livestock had for many years been handled by the line-haul carriers to the stockyards; and the physical operations that would be necessary if the Junction were required to make private-track delivery of livestock". Of course it was necessary for the Commission to consider these factors. But it was illegal for the Commission to go on to decide that any of these factors, singly or collectively, could legalize what would otherwise constitute violations of the Act. And moreover, since "the discrimination shown was palpably unjust and forbidden by the Act", "there is no room * * * for administrative or expert judgment with respect to practical difficulties." *Mitchell* v. *United States*, 313 U. S. 80, 97.

**B. The record disproves the railroad appellees' contention that the service demanded by Swift can not be performed.**

The railroad appellees repeatedly refer to the delivery sought by Swift as "an extremely difficult and impractical operation" (R. R. Br. 10, 32, 57; *cf.* R. R. Br. 31, 50, 74). They then speak of "operating difficulties of an insuperable character" (Br. 31); next, warming to their task, they say that "the evidence * * * proves the Swift proposal to be a physical and practical impossibility" (R. R. Br. 65; *cf.* R. R. Br. 49); and finally, apparently on the theory that overstatement is the best defense, they speak of "the undisputed evidence which shows that the proposed operation cannot be performed" (R. R. Br. 119).

While the statement last quoted can not fairly be criticized for reflecting any lack of exuberance, it is demonstrably inaccurate.

First. The Commission, far from finding that the delivery sought was impossible, specifically cancelled the proposal of the Chicago Junction to eliminate such delivery altogether (R. 81), and further specifically found that such delivery was physically possible (R. 72).

Second. While the Commission found that even the delivery of Swift's direct shipments alone, averaging 18 cars of livestock daily, "would considerably delay and burden defendants' operations" (R. 75), we pointed out that this finding lacked the support of substantial evidence (Swift Br. 99-102).

Third. We could—and doubtless should—have added that the Examiner had specifically found, in great detail, not only that sidetrack delivery of Swift's direct shipments was physically feasible, but also that the Junction's protestations of difficulty were not well founded. The Examiner said (R. 238-239)—and we set forth this excerpt in full because of its importance——

> The Junction contends that it has no classification tracks available for assignment to livestock or any

space in its yards where such tracks could be constructed. It asserts that it would have to maintain a standby service so that a switching engine could immediately pick up a set out car or cars on the running track and make a special trip to the private side track of complainant. However, as hereinbefore shown, livestock can be and is handled in consolidated trains with other freight and there is no apparent reason why direct shipments consigned to complainant could not be placed on an interchange track for subsequent removal to complainant's plant. The Junction contends that if it has to make delivery of livestock to complainant, the cars would have to be grouped by the line-haul carriers in a convenient place in the train with other freight intended for set out in the South Yard and thereafter an engine and crew would segregate the livestock from the dead freight and make a special run to reach the private tracks of complainant. It asserts that as livestock arrives at all hours over many trunk-line carriers this would entail a difficult and expensive operation. This assertion is not borne out by the facts of record. Dead freight for delivery to complainant is set out by the Junction on track 19 in the South Yard, which track is assigned for the classification of loaded cars consigned to complainant. Subsequently, those cars are switched by Junction power to the Damen Avenue Yard, which adjoins the South Yard and is just west of complainant's present and proposed plants. The Damen Avenue Yard has 15 tracks with a capacity of 550 cars. After arrival in that yard complainant issues instructions to spot the cars for unloading at designated locations in its plant area. No reason appears why livestock could not also be placed on an assigned track in that yard and the run made, at carrier's ordinary operating convenience, to complainant's plant without undue difficulty or delay. The switching operation that would be necessary to reach the proposed unloading chutes after leaving Damen Avenue Yard would be as follows: The engine would pull the cars over auxiliary track 1105 to the clearance point of the entrance switch to the facility east of Ashland Avenue. At that point the engine would uncouple and proceed around the train. While so engaged the cut of cars would have

to be controlled by air, as there is a descending grade east from Ashland Avenue to the proposed plant. The engine would then recouple and shove the cars downgrade and around a curve to the unloading chutes. This operation would differ from the present method of switching dead freight or empty cars into this district only in that for the latter operation no air is used although the danger is always present of cars breaking off on the descending grade and rolling freely for a short distance before striking standing cars. Manifestly, that contingency would have to be avoided in handling cars of livestock. Cars made empty could be returned to the Loomis Yard when for eastern or southern connecting lines or to the North Yard when for western connections, which procedure is presently followed by the Junction in handling empty cars other than livestock cars.

The foregoing findings proposed by the Examiner are of particular significance, not simply because of his normal opportunity to "hear and observe the witnesses", but because of what the present record reflects as to the nature of that opportunity. It is clear that most of the railroad operating witnesses on their direct examination were reading from prepared statements;[7] and all may have been.[8] Thus only the Examiner was in a position fully to appreciate the weight to be accorded these witnesses' opinion evidence as to future possibilities, and to judge whether and to what extent their testimony reflected simply a written conclusion prepared in advance by the particular wit-

---

[7] Starbuck of the Burlington (R. 609); Stein of the Chicago & North Western (R. 646); Heide of the Rock Island (R. 649, 652); Kiesele of the Milwaukee (R. 683); and Clousing of the Santa Fe (R. 691, 698).

[8] It is not clear whether Sorensen or Kinsella of the Chicago Junction similarly testified from a prepared statement, although the reporter's repeated references to "(Continuing)" throughout the testimony (R. 438, 440, 442, 446, 450) would seem to indicate that the latter witness at least was doing so.

ness or by a third party. Moreover, the Examiner, accompanied by counsel for all the parties, made an inspection of the actual operations of the Chicago Junction. See R. 503. The Examiner's conclusions quoted above are therefore not only fully entitled to the great respect normally given such determinations, they deserve in this case to be treated as well-nigh conclusive.

It follows, therefore, that the railroads' reference (R. R. Br. 119) to "the undisputed evidence which shows that the proposed operation cannot be performed" is simply not based on the present record, however much it may exemplify the zeal and hyperbole of resourceful advocacy.

## IV. BEARING OF APPELLEES' ACTS CONTRIBUTING TO THE CONGESTION.

### A. Analysis of congestion made to show unsoundness of Commission's reasoning.

Chicago Live Stock Exchange argues (Br. 45) that "The Swift complaint did not pray for relief with respect to the adequacy of facilities and service on the Junction and the fact the Commission issued no order to require additional facilities or services does not invalidate its order of dismissal of Swift's rate complaint"; and further (Br. 45-46) that "appellant argues that the Commission's order of dismissal of Swift's rate complaint should be set aside because the Commission failed to require such added facilities and service by the Junction as might be necessary to handle livestock in switching service to private siding."

These contentions completely misapprehend the direction of the arguments under our Point IV (Swift Br. 105-116). It was this:

The Commission justified its refusal to strike down the discrimination proved on this record because of the congestion on the tracks of the Chicago Junction, and in its report noted some of the factors which contributed to that congestion, *viz.*, the capacity operation of the Junction's motive power (R. 68), a restrictive labor agreement which im-

paired that road's efficiency (R. 61), and the unregulated operation of foreign train crews on the Junction's tracks (R. 64).

Our argument was that these factors were within the Commission's power to correct, but that the Commission failed to exercise its power to alleviate the congestion; and we also called attention to two other factors contributing to the congestion, also within the Commission's corrective power, but here unnoticed by it, *viz.*, the discriminatory granting and withholding of trackage rights, and the unlawful rule of the Union Stock Yards directed against dead freight. In other words, our contentions were not in the nature of prayers for independent affirmative relief, they served to establish the unsoundness of the Commission's justification for continuing the discrimination.

Our contentions also showed, of course, a whole series of overt acts implementing the combination in restraint of trade reflected by the covenant between the Union Stock Yards and the lessee of the Chicago Junction (Ex. 57, R. 1961-1962).

**B. The railroads' attempt to establish the adequacy of Chicago Junction's motive power is effectively contradicted by that carrier's operating heads.**

The railroad appellees (R. R. Br. 115-117) attempt to rationalize the decline in the Chicago Junction's motive power by arguing, *inter alia*, that a similar decline has taken place on all roads. But, in their endeavor to disprove our assertion that the Junction's supply of engines was insufficient to take care of all industrial placement (Swift Br. 24, 107), they quote only a portion of the relevant testimony. Since it is not extensive, we set forth all of it here.

*Superintendent Kinsella* (R. 524, 525-526):

> Q. And you think the Diesel is more efficient in the industrial places?
>
> A. I think so, yes. I think it has better lateral activity and it can get around shorter turns and side clearances.

Q. Have you sufficient Diesels to take care of all of the industrial placements of cars?

A. No, sir, no, sir, we have not.

* * * *

Q. Have you additional motive power on order at the present time?*

A. I can not answer on whether or not it is on order, but I know we have been trying to get some additional Diesel equipment. We want at least five of them if we can get them.*

Q. Five additional Diesels?*

A. Yes.*

*Assistant Superintendent Sorensen* (R. 555):

Q. Your assumption is, I take it, that the railroads have been able to obtain their normal requirements of freight cars, locomotives, steel for rail, etc., during the war and since?*

A. In so far as the Chicago Junction is concerned we have had sufficient cars. Our locomotive supply has been from time to time inadequate.*

The questions and answers marked with asterisks, which of course prove our original contentions as to the inadequacy of the Junction's motive power, are neither printed nor referred to in the railroad appellees' brief.

## V. THE COVENANT TO DISCRIMINATE IS ENFORCED BY THE RULINGS BELOW.

The Government argues (Br. 35-36) that appellant's contentions that the discriminatory covenant forces "packers, like Swift, to use the Union Stock Yards and pay them for unwanted and unnecessary services" are "grievances" that "have no place in this case". In support of that argument it cites the portion of the Egress Case opinion (*Swift & Co. v. United States*, 316 U. S. 216, 232-233) which says that neither the Commission nor the Court "can assume that the charges or practices of [the Union Stock Yards] are unfair or unreasonable, that it is charging for services that

are not performed or facilities not used, or that it is imposing on consignees unnecessary services"; and which goes on to point out that the Secretary of Agriculture is the regulatory forum to hear and determine grievances arising in public stockyards. The Government accordingly concludes (Br. 36) that "the charges imposed by Union Stock Yards have no bearing whatever on this case."

This attempt to make cavalier disposition of one of the gravest issues in the case, however convenient it would be for the Government's purposes, does not withstand examination of the issues considered in the Egress Case. There, as the Court specifically pointed out (*Swift & Co.* v. *United States,* 316 U. S. 216, 227) "the shipments involved are consigned to the packers at the Union Stock Yards by their own choice. It does not appear that they are demanding an increase of other facilities, and the case has not been considered in that light."

Moreover, the discriminatory covenant whereby the New York Central agrees to operate the Chicago Junction for the "benefit, advantage, and behoof of the business and affairs" of the Union Stock Yards (Ex. 57, R. 1961-1962) had not come to light when the Egress Case was under consideration. That covenant had not then, so far as this appellant was aware, been invoked to force the Central and the Junction to take action which they would not otherwise have taken. Nor had the operations of the Junction been analyzed to show how they implemented the terms of the covenant. Consequently, while the Court in the Egress Case could not assume that the Union Stock Yards were "imposing on consignees unnecessary services" (316 U. S. at 233), here that allegation does not rest on assumption, but is proved to the hilt.

Moreover, the circumstance that the Secretary of Agriculture has regulatory powers over rates for stockyards services, an obviously pertinent factor when "the shipments involved are consigned to the packers at the Union Stock Yards by their own choice" (316 U. S. at 227), is completely irrelevant when shipments are consigned elsewhere, and

when their consignment to the Union Stock Yards is sought to be avoided. The Union Stock Yards are described by one witness (R. 919) as "a magnificent hotel for livestock." Swift happens not to desire hotel accommodations for its animals, being prepared and desiring to receive them at home, and it is therefore no answer to its present demand to say that there is available an agency which regulates the rates charged by hotels.

The short of the matter is that, on familiar principles, the language of the Egress Case is "to be read in the light of the facts of the case under discussion" (*Armour & Co.* v. *Wantock*, 323 U. S. 126, 132-133), and that accordingly this language is not in any sense dispositive of the present controversy, where different relief is sought, and where the purposes and practices of the Union Stock Yards and of those covenanting with it have been laid bare and established by proof.[9]

The Government's only other references to the discriminatory covenant (Br. 51), "that the Commission's decision is not in any respect whatsoever based on the contract clause in question," and (*id.*) that "The Commission not only gave it no weight at all in reaching its conclusion, but on the contrary rejected the suggestion that it had any significance," serve only to emphasize our strictures (Swift Br. 132) concerning the Commission's "utter failure to perceive the operation and effect and essential vice of that agreement."

We do not propose to restate—or repeat—our argument under this heading, which assuredly is not met by anything in any of the intervening appellees' briefs. But we venture the observation that the Government, which in cases under the Sherman Law and in cases involving the conspiracy provisions of Title 18 of the U. S. Code is astute to per-

---

[9] The several appellees' repeated and voluminous quotations from the opinion in the Egress Case would seem to indicate that the admonition in *Armour & Co.* v. *Wantock, supra*, which indeed simply restated what Chief Justice Marshall first expressed in *Cohens* v. *Virginia*, 6 Wheat. 264, 399, still bears repetition.

ceive and point out the interrelationship, the effect, and the evil consequences of concerted action, seems singularly unconcerned over the revelations contained in the present record. We have spoken of the covenant (Swift Br. 133) as "the common and vitalizing element of an effective combination to restrain trade with the appellant at its sidetrack, to its detriment, but for the benefit, advantage, and behoof of the Union Stock Yard and Transit Co. at the latter's yards a few city blocks distant"; and we employed that language advisedly. The Government does not undertake specifically to deny that the record reveals the existence of such a combination, yet its position in the case appears to be that the public interest is better served by its endeavor to support a single and obviously ill-advised ruling of a regulatory body than by the slightest attempt on its part to deal with or even recognize the "effective combination in restraint of trade" (Swift Br. 46, 117, 125, 133) whose operations we analyzed at length and in detail.

The result is that the Government's argument in this case is andabatarian, recalling the hoodwinked gladiator of old, who, forced to fight in a helmet without eye-holes, struggled blindfold in ignorance of the location or even of the identity of his true enemy.

## VI. THE UNION STOCK YARDS' ECONOMIC ACCUSATIONS ARE DISPROVED BY THE GOVERNMENT'S IMPARTIAL STUDIES CONTAINED IN THIS RECORD.

The Union Stock Yards level an apparently grave accusation at Swift, saying (Br. 21),

> The ultimate purpose of Swift's effort to obtain an advantage over market stock is the destruction of the public market at Chicago as the price-determining market of this country.

This allegation is further documented as follows (U. S. Y. Br. 22, 23, 24):

> The handling of livestock by the Junction to packing plants on its line, as Swift well knows, would seriously disrupt and delay the handling of market stock to the Union Stock Yards; and the deterioration in transportation service to the Yards, as Swift also well knows, would inevitably result in the destruction of the market.
>
> * * * * *
>
> The destruction of the Chicago market as the price-determining market of the country would put Swift in a more advantageous position in dealing directly with the livestock producers * * *.
>
> * * * * *
>
> If Swift can destroy the Chicago market as the price-determining market, it will also be able to improve its competitive position over many of the smaller packers in Chicago, which do not have, and probably could not afford to establish, buying stations and organizations in the country.

We recognize, of course, that the economic conflicts implicit in the present controversy are not for judicial resolution. But we think it may be of interest to set forth the true facts, if only as an index to the accuracy of the allegations hurled against us. The fact of the matter is that every economic premise relied on by the Union Stock Yards is directly contrary to the conclusions reached, not by hired "experts," but by the U. S. Department of Agriculture in "The Direct Marketing of Hogs", a publication prepared in its Bureau of Agricultural Economics, and included in this record (Ex. 55, R. 1897-1960).[10]

First. This official study specifically states (R. 1935) that "Chicago is not a basic market in the sense that hog values for the country are determined there. * * * The fact that Chicago is the most important registering point of hog prices does not make it the determinant of the level of hog prices." And the same is true of other points, mostly pub-

[10] Only a small portion of the cited exhibit was actually printed. See R. 223, item D(2)(b).

lic markets, where price quotations are published. "These points are not price-determining points but only price-registering points, and there is no one basic price-determining point" (R. 1921; see also R. 1926). Prices are determined by the competition of the packer for the available supply offered (R. 1946), and the basic price-determinating factors are the same everywhere (R. 1951). The public market at Chicago no more determines prices than the rooster crowing in the barnyard determines the time of sunrise.

Second. The public market at Chicago—*i. e.*, salable livestock consigned to the Union Stock Yards—has declined from 17,469,160 head in 1923 to 4,811,918 head in 1947 (Ex. 43 at R. 1646-1649); this is a decrease of 72.5%.[11] To the extent that this tremendous decline involves a "destruction" of what is still the largest public livestock market in the country, see Ex. 26, not printed and Swift Br. 105, it is simply a reflection of the economic factors summarized in Swift Br. 7-11 and analyzed in detail in Ex. 55. The fact of the matter is that, as the mounting percentage of direct sales shows, sale of livestock on consignment to a public market is an obsolescent means of marketing under present-day conditions (*cf.* R. 1939).

Third. The statement last made is based on the demonstrable fact that direct selling is more desirable for the producer:

(1) The producer gets a larger return from direct as opposed to commission selling (R. 1908, 1913, 1915).

(2) Direct selling reduces marketing costs (R. 1921).

---

[11] This is more than the 64% decline in the Union Stock Yards' total receipts over the same period (Swift Br. 9), because while direct shipments were only 5.5% of the total receipts at that market in 1923, they amounted to 27.7% of the total in 1947 (Ex. 43 at R. 1646-1649, 1679; Ex. 46 at R. 1848). The 1947 percentage of direct shipments by rail was of course higher than the percentage of total direct shipments, see Ex. 28, R. 1117, for obvious reasons.

(3) The competition at interior points is more favorable to the seller than at public markets. "At public markets the competition is for a supply of hogs that is physically present, largely out of the control of the producers, and under the necessity of early sale. At interior buying points it is a competition to draw hogs, that are still under the control of the producer, to different points. * * * [T]o the producer at home, with hogs for sale, the latter competition [*i. e.*, posted prices and telephone or personal requests for bids] is more useful since he is in a stronger position opposite the buyer with his hogs still at home than he would be if they were at a public market and had to be sold" (R. 1921-1922; see also R. 1947, 1951).

(4) Bearing on the foregoing is a little realized but undoubted fact, *viz.*, that the commission men on the public market "are paid a commission for their services which is unrelated to the price at which hogs are sold. Hence they have no actual interest, as salesmen, in the price level of hogs. Their chief concern is to sell the hogs consigned to them in line with the market so that their customers will be satisfied. * * * Hence, commission salesmen, having no ownership interest in the product, usually will not risk having to carry hogs over from day to day in an effort to raise the level of hog prices." (R. 1945, 1946.)

Fourth. The producer, being more than ever free to select his own method of marketing (R. 1952), will of course employ the means most favorable to his own interest. That direct selling continues to be that means is shown in the increases in that method *after* 1933, the last year shown in the study from which the foregoing analysis has been taken.[12]

---

12

| | Percentage of Direct Sales to Total Sales | |
|---|---|---|
| | 1933 (R. 1899) | 1946 (R. 1011, 1026) |
| Hogs | 44% | 64.4% |
| Sheep | 21% | 41.8% |
| Calves | 26% | 40.7% |
| Cattle | 17% | 25.5% |

Fifth. Apart from the above, the Union Stock Yards' new-found solicitude for the public market and for the small packer is not, on this record, particularly convincing.

For one thing, the Yards' revenues depend, not upon a sale made on its premises, but on an egress therefrom. *E. g.*, R. 428. Whether the animal has been bought by the packer from a producer in Iowa, or from a commission man in Chicago, makes not a penny of difference to the Union Stock Yards' revenues.

Next, even the smaller packers are in fact able to purchase direct shipments in the country for consignment to themselves at the Union Stock Yards. See Ex. 29, R. 1118-1121.

And, finally, it is only when the Union Stock Yards apprehends losing all direct shipments—from the larger packers—shipments that have no connection with the public market in Chicago, that it considers its business threatened with destruction. Ex. 57, R. 1961.

In short, the Union Stock Yards' concern is what one would normally expect it to be, *viz.*, a solicitude single to itself and its own business.

---

We repeat, we recognize that this Court is not a tribunal to resolve the competitions of the market. But if economic accusations are to be bandied about, they should be based on fact, rather than fly in the teeth of impartial and objective studies. We have, therefore, thought it worth while to set forth the facts so that the accusations quoted at the beginning of this section could be recognized and evaluated for what they actually are.

## VII. THERE IS NO ESTOPPEL AGAINST THE ASSERTION OF RIGHTS UNDER THE INTERSTATE COMMERCE ACT.

Appended to the railroad appellees' brief is a facsimile copy of the cover and all 64 pages of a brief filed with the Interstate Commerce Commission on behalf of the Omaha Packing Company, in the case of *Hygrade Food Products*

*Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, and signed by two of this appellant's present counsel. It was written in March 1932, three years before the *Hygrade* case was argued in this Court, *sub nom. Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193; ten years before this Court heard argument in the Egress Case, *Swift & Co.* v. *United States*, 316 U. S. 216; and just twenty years before the hearing in the case at bar.

Moreover, when that brief was written, early in 1932, transportation conditions in the stockyards area were vastly different. In 1931, the last full year then available, 196,443 cars of livestock had been shipped by rail to the Union Stock Yards (Ex. 46 at R. 1845), whereas in 1947, the last year shown on the present record, such shipments had fallen to 53,561 cars (Ex. 28, R. 1117). Otherwise stated, rail shipments of livestock to the Union Stock Yards at the time of the earlier brief were 366% of similar shipments for the latest available year now reflected in evidence.[13]

We are at a loss to understand what legitimate purpose is now sought to be served by the reproduction of this twenty-year old document, or by the repeated references thereto and quotations therefrom which interlard the railroad appellees' brief in this case.

If the intended purpose is the setting up of an estoppel, obviously that attempt is foredoomed to failure; there is no estoppel against the assertion of rights under the Interstate Commerce Act. *Los Angeles Switching Case*, 234 U. S. 294, 312-313.

If the railroads' purpose is to score debating points on the basis of what, read in a different context twenty years

---

[13] The railroads (R. R. Br. 14, 37) speak of the rail shipments of livestock to the Union Stock Yards as "averaging 76,920 cars per year for the five years preceding the hearing before the Commission." If the average for the five years preceding the filing of the *Hygrade* brief were similarly used, the figure for that period would be 220,155 carloads per year (Ex. 46 at R. 1845). This is 286% of the shipments relied on by the railroads now.

later, may be apparently inconsistent with later arguments in other litigation involving vastly changed conditions, then the answer is that appellant does not propose to waste its time—nor, preeminently, the time of the Court—by indulging in such trivia.

We assume, of course, that the brief in question has not been exhumed simply to furnish material for an extended argument *ad hominem*.

## CONCLUSION.

For the foregoing additional reasons, the judgment of the court below should be reversed, with directions to set aside the order of the Interstate Commerce Commission, and to remand the proceeding to that body with instructions to proceed according to law, and in conformity with the opinion of this Court.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.

WM. N. STRACK,
ARTHUR C. O'MEARA,
JOHN P. STALEY,
ROSS DEAN RYNDER,
4115 South Packers Avenue,
Chicago 9, Illinois,
*Counsel for the Appellant.*

MARCH 1952.